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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of)	MM Docket No. 88-577
)	
LIBERTY PRODUCTIONS,)	File No. BPH-870831MI
A LIBERTY PARTNERSHIP)	
)	
Et. Al.)	
)	
For Construction Permit for		
New FM Channel 243A		
Biltmore Forest, North Carolina		

To: The Commission

OPPOSITION TO MOTION TO ENLARGE ISSUES

Liberty Productions,
A Limited Partnership
by counsel:

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SUMMARY

The Commission accepted Liberty's short form application (FCC Form 175) for filing and announced its determination that the application was complete. That action, taken pursuant to delegated authority is now final and no longer subject to reconsideration or review. However, even had that determination been timely challenged, Liberty would have had the right to amend its application, if found to be incomplete, in accordance with 47 CFR 1.2105(b).

Liberty properly certified that its limited partner's interest was nonattributable. 47 CFR 73.5008(c), as revised, provides that in order for a limited partner's interest in the applicant to be nonattributable, it must (a) comply with the criteria set forth in 47 CFR 73.3555 and Note 2, thereto, and (b) the limited partner's interest may not exceed 33% of the applicant's "total asset value (equity plus debt)". BFBFM offered no evidence that Liberty failed to comply with either of these requirements. Furthermore, 47 CFR 73.5007 defines a "recognizable" interest" is one that equals more than 50%, but as BFBFM's own evidence confirms, Murray holds only a 50% interest in WRZK(FM).

BFBFM has offered no evidence of any false statement of fact, much less intent to deceive, with respect to Liberty's representations regarding its Loan Agreement with Cumulus Broadcasting, Inc. The Commission determined that an applicant's

entitlement to the new entrant bidding credit would be determined on the basis of those media interests that were attributable to the applicant as of the deadline for submission of the short form application. That determination is now final and no longer subject to reconsideration or review. BFBFM offers no evidence to counter Liberty's contention that it had no agreement or understanding with Cumulus on the relevant deadline, August 20, 1999. Accordingly, Cumulus' interests are not attributable to Liberty.

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To: The Commission

OPPOSITION TO MOTION TO ENLARGE ISSUES

Liberty Productions, a Limited Partnership ("Liberty") by counsel herewith submits its opposition to the Motion to Enlarge Issues filed by Biltmore Forest FM, Inc. ("BFBFM") on November 12, 1999 in the above referenced proceeding. In support whereof the following is shown:

1. Pursuant to 47 CFR 1.229(d), motions to enlarge issues are required to be premised upon factual allegations, supported by the statement of one having personal knowledge of the facts. BFBFM's Motion is not so supported. In the absence of such support, the Commission may consider only those matters with respect to which it properly may take official notice.

2. While BFBFM may have been precluded from filing motions to enlarge or otherwise challenging Liberty's basic qualifications prior to the release of the October 28, 1999 Order (DA 99-2355), it was not precluded from seeking timely

reconsideration or review of the various actions taken by the Commission pursuant to delegated authority, which it now seeks to challenge collaterally by advancing unsupported and disingenuous allegations of misrepresentation. Thus, BFBFM failed to advance any timely challenge to the Commission's determinations that: (a) Liberty's short form application was acceptable and complete; (b) only interests in excess of 33% of a bidder's total asset value would be attributable; and (c) an applicant's entitlement to the new entrant bidding credit would be determined on the basis of the media interests attributable to it as of the deadline for submission of short form applications. Having failed to seek timely reconsideration or review of such determinations, it has waived its opportunity to do so and its attempt to recast its complaints in the form of allegations of misrepresentations on the part of Liberty is without merit and frivolous.

I. The Commission properly determined that Liberty's short form application was complete and that determination is final.

3. BFBFM contends that Liberty's short form application (FCC Form 175) was incomplete, as filed, and should have been and now should be dismissed. BFBFM bases its contention solely upon a provision contained in Attachment B to Public Notice (DA 99-1346), released July 9, 1999 ("DA 99-1346"), which it interprets as requiring the submission of a certification to support the nonattribution of the media interests of immediate family members, regardless of whether such interests exist.

4. As an initial matter, the referenced certification is not required pursuant to 47 CFR 1.2105(a). Furthermore, the provisions in Attachment B to DA 99-1346 clearly imply that the referenced certification is necessary to avoid the attribution of the media interests of immediate family members, only where such interests actually exist. As such, the referenced certification was inapplicable to Liberty. The only person having any attributable interest in Liberty is its sole general partner, Valerie Klemmer Watts. As reflected in her attached Declaration, none of the members of her immediate family have or have ever had any media interests that would have given rise to the need for such a certification.

5. In any event, the Commission did not consider the absence of the certification to provide any basis for either dismissing or requiring the supplementation of Liberty's application. Pursuant to Public Notice (DA 99-1800), released September 3, 1999, the Commission accepted Liberty's short form application for filing and announced its determination that the application was complete. See: DA 99-1800 at Attachment A, page 12. Subsequently, by Public Notice (DA 99-1912), released September 17, 1999, the Commission found Liberty qualified to bid in the auction.

6. Actions taken pursuant to delegated authority are effective upon release of notice thereof to the public. See: 47 CFR 1.102(b). As noted above, DA 99-1800 was released to the public on September 3, 1999 and DA 99-1912 was released on

September 17, 1999. Any petition for reconsideration or application for review of either action, both of which were taken pursuant to delegated authority, was required to be filed within thirty (30) days of the effective date of such action. See: 47 CFR 1.106 & 1.115. Neither BFBFM nor any other party filed any petition for reconsideration or application for review, challenging either the determination that Liberty's short form application was acceptable and complete or the determination that Liberty was a qualified bidder. Accordingly, those determinations constitute final actions of the Commission and are no longer subject to reconsideration or review. Thus, BFBFM's request for enlargement of the issues in this regard is entirely unsupported and must be denied.

7. Finally, even had those determinations been timely challenged, Liberty would have had the right to amend its application, if found to be incomplete, in accordance with 47 CFR 1.2105(b) and DA 99-1800. Thus, had a certification regarding nonexistent "media interests of immediate family members" been essential, the Commission was obligated to advise Liberty of this fact and accord it the opportunity to amend its short form application by the deadline to supply such a certification. 1/

1. Pursuant to 47 CFR 1.2105(b), only the omission of the information required to be included by 47 CFR 1.2105(a) would result in the application being found unacceptable. No certification regarding "media interests of immediate family members" is required pursuant to Section 1.2105(a) and, thus, Liberty was entitled to supply such a certification by means of an amendment, had the Commission determined that its absence rendered the application incomplete.

The fact that the Commission did not do so, but instead determined that Liberty's application was acceptable and complete is dispositive. Accordingly, the requested issue is moot in any event.

II. Liberty has made no misrepresentation regarding the media interest of its limited partner nor is his media interest attributable to Liberty.

8. Liberty truthfully and accurately represented that no person holding an attributable interest in Liberty held any media interests. See Liberty's FCC Form 175, Exhibits A and C. BFBFM acknowledges that Liberty accurately disclosed that it had two principals: Valerie Klemmer, its sole general partner, and David Murray, its sole limited partner. It, likewise, acknowledges that Liberty asserted that Murray's interest in Liberty was nonattributable.

9. Given the fact that Liberty accurately disclosed the relevant facts, there exists no basis, whatsoever, upon which BFBFM could credibly seek a misrepresentation issue. No evidence has been offered of any false statement of fact, much less any intent to deceive. BFBFM has offered no evidence to support its contention that the interest of David T. Murray, Liberty's sole limited partner, is attributable to Liberty. It offers no evidence to contradict the Presiding Judge's determination that Liberty is a bona fide limited partnership (FCC 90D-18, 5 FCC Rcd. 2862 (1990) at paragraph 113) nor any evidence that Liberty has violated any of the restrictions on the involvement of its

limited partner in its affairs. Nor has it offered any evidence that Liberty is not otherwise in strict conformity with the nonattribution criteria set forth in 47 CFR 73.3555 and Note 2, thereto. Instead, BFBFM bases its claim entirely upon its interpretation of the Commission's Memorandum Opinion and Order (FCC 99-201), released August 5, 1999 ("FCC 99-201"), which it clearly mischaracterizes and apparently misapprehends.

10. Contrary to BFBFM's contention, the Commission did not provide in FCC 99-201 that a limited partner's interest would be attributable under all circumstances. Instead, the Commission simply added an additional requirement to the traditional criteria for nonattribution, all of which were intended to be applied in determining eligibility for the new entrant bidding credit. See: FCC 99-201, at Appendix C. Thus, 47 CFR 73.5008(c), as revised, provides that "an attributable interest shall be determined in accordance with 73.3555 and Note 2" and that the newly adopted 33% threshold would apply "in addition" to the criteria set forth at Section 73.3555. See: FCC 99-201, Appendix C.

11. As revised pursuant to FCC 99-201, 47 CFR 73.5008(c) provided that in addition to the meeting the criteria set forth in 47 CFR 73.3555 and Note 2, thereto, in order to be deemed nonattributable for purposes of the new entrant bidding credit, Murray's interest in Liberty could not exceed 33% of Liberty's "total asset value (equity plus debt)". As reflected in the attached Declaration of Valerie Klemmer Watts, prior to

submission of Liberty's short form application, she determined that Murray's investment in Liberty, which did not exceed \$ 36,000.00, equaled less than 33% of Liberty's total equity plus debt, which exceeded \$ 120,000.00. ²/ This was precisely the determination required by 47 CFR 73.5008(c), as amended. Having made that determination, she properly represented that Murray's interest in Liberty was nonattributable.

12. Furthermore, pursuant to 47 CFR 73.5007, a "recognizable" interest" is one that equals more than 50%. As BFBFM's own evidence confirms, Murray holds only a 50% interest in WRZK(FM). Thus, Murray's media interest would not constitute a "recognizable interest" for purposes of determining Liberty's entitlement to the new entrant credit, even if his interest in Liberty were attributable.

13. Given that Liberty accurately disclosed the relevant facts ³/ and given BFBFM's failure to even attempt to identify any factual statement that was untrue, much less known to be so, its request for addition of a misrepresentation issue is unsupported and entirely frivolous.

2. Murray is not a creditor of Liberty. See Attached Declaration.

3. The provisions attached to BFBFM's Motion at Exhibit A, plainly reflect that with respect to "partnership applicants", such as Liberty, ownership information need not be provided with regard to any limited partner who is "not involved in the management and operation of the media related activities of the partnership". Thus, Liberty was not required to provide any information regarding Murray in its short form application. All it was required to submit was a certification to support the nonattribution of his interest, which it included.

III. Liberty has made no misrepresentation regarding its entitlement to the new entrant credit and the media interests of Cumulus Broadcasting, Inc. are not attributable to Liberty.

14. BFBFM acknowledges that Liberty amended its short form application (Form 175) to reflect that it had entered into a loan agreement with Cumulus Broadcasting, Inc. ("Cumulus") on September 10, 1999. BFBFM also acknowledges that Liberty asserted that Cumulus' media interests were not attributable to Liberty, because it had no agreement or understanding with Cumulus, as of August 20, 1999. Given this acknowledgment, it is clear that BFBFM knew or should have known at the time it submitted its Motion that it had no basis, whatsoever, for requesting any misrepresentation issue. By its own admission Liberty had disclosed the existence of its agreement with Cumulus, as well as stated its position that the media interests of Cumulus were not attributable and the basis of that position. BFBFM points to no false statement of fact or even any inaccuracy. Instead, it simply disagrees with Liberty's position. Inasmuch as BFBFM has sought a misrepresentation issue based solely upon a disagreement as to the legal significance of Liberty's agreement with Cumulus, its request is not only utterly without merit, it is plainly frivolous.

15. BFBFM's characterization of Cumulus as a "principal" of Liberty is entirely unsupported, as are its contentions that Liberty "falsely certified" that Cumulus' interests were not attributable to Liberty and that Liberty and Cumulus have entered

into "bogus auction arrangements". Likewise, its characterizations of the Loan Agreement as a "sham" is unsupported by any evidence, whatsoever, as is its characterization of Cumulus as anything other than a creditor of Liberty. As noted above, BFBFM's Motion is unsupported by any statement of any person having knowledge of any relevant facts. Yet, BFBFM fails to point to any evidence of which official notice may be taken in support of its outrageous claims. Given its entirely unsupported nature, BFBFM's Motion is utterly frivolous and appropriate sanctions should be imposed. ⁴/

16. Contrary to the unsupported nonsense advanced by BFBFM, the plain language of the Commission's Public Notice (DA 99-1346), released July 9, 1999 ("DA 99-1346"), fully supports Liberty's position that the media interests of Cumulus are not

4. Sanctions are especially appropriate, here, given the identity of BFBFM's majority owner and controlling principal, J. McCarthy Miller. Miller was previously found to have submitted and simultaneously prosecuted 3 FM, 46 MMDS, 72 LPTV and 30 cellular applications, the construction and initial operating costs of which would have exceeded \$ 80 million, while having at his disposal less than \$ 2 million to meet these costs. See: Breeze Broadcasting Company, Ltd., 7 FCC Rcd. 1653 (ALJ 1992). Miller's conduct in this regard reflected what may well have been the greatest fraud that has ever been perpetrated on the Commission. While the Commission ultimately found Miller financially qualified with respect to his Gulf Breeze FM application, it did so by resolving a narrow issue and explicitly did not address his misrepresentation of financial qualifications with respect to the 148 LPTV, MMDS and cellular applications, as no such issue had been added in the case. See: Memorandum Opinion and Order (FCC 98-286), released November 6, 1998, at para. 28. Nevertheless, the findings reflected in the Supplemental Initial Decision are more than sufficient to establish a prima facie case of misrepresentation, as well as to support summary disposition of such an issue, once added. 7 FCC Rcd. 1653

attributable to Liberty, because no agreement or understanding existed between them, as of August 20, 1999: "The bidder's attributable interests shall be determined as of the short form (FCC Form 175) filing deadline -- August 20, 1999." See: DA 99-1346, at page 8.

17. As discussed above, actions taken pursuant to delegated authority are effective upon release to the public and any petition for reconsideration or application for review of an action taken pursuant to delegated authority must be filed within thirty (30) days of the effective date of such action. Neither BFBFM nor any other party challenged the Commission's determination that a bidder's entitlement to new entrant credit would be determined based upon the interests that were attributable to it as of the short form filing deadline (DA 99-1346, page 8). Inasmuch as no such petition or application for review was filed, challenging that determination, and the Commission did not reverse or modify the determination on its own motion pursuant to 47 CFR 1.117, it constitutes a final action of the Commission and is no longer subject to reconsideration or review.

18. Accordingly, the media interests of Cumulus are not attributable to Liberty because, as of August 20, 1999, the deadline for the submission of Liberty's short form application, there existed no agreement or understanding between Liberty and Cumulus which could have given rise to any attribution. Therefore, not only did Liberty not make any false statement of

fact with respect to the nonattribution of Cumulus' media interests, the plain language of DA 99-1346 confirms that those interests are not attributable.

19. While BFBFM contends that the referenced language (at page 8) of DA 99-1346 was intended only to apply to the applicant's principals, it points to no evidence, whatsoever, to support that interpretation. In fact, BFBFM's contention is refuted by the plain language of DA 99-1346, which included no such limitation. The Commission plainly contemplated that some bidders would secure financing from third parties who held media interests. See, generally: Memorandum Opinion and Order (FCC 99-201), released August 9, 1999. Yet, DA 99-1346 makes no attempt to distinguish the media interests of creditors from those of principals. Instead, the Commission made clear that the bidder's entitlement to a new entrant bidding credit would be determined on the basis of the interests that were attributable to it as of the filing deadline, without regard to any subsequently acquired interests.

20. BFBFM's claim that the approach adopted by the Commission would undermine the purpose of the new entrant credit is unsupported and unpersuasive. As an initial matter, the adoption of some cut-off date for determining entitlement to the new entrant credit was necessary. The Commission had to prepare the necessary bidding software and otherwise make preparations for the efficient conduct of the auction, which involved over 100 construction permits. More importantly, the Commission's

decision to determine eligibility for the new entrant bidding credit as of the deadline for submission of short form applications did not undermine the purpose of the credit, because the Commission had previously adopted rules to assure that the purposes for awarding the credit were achieved. In that regard the rules provide that an applicant who utilizes a new entrant credit must construct and operate the station for five years, regardless of how it finances its purchase of the permit at the auction. If it disposes of the station in less than five years, it must reimburse the Commission for the bidding credit, plus interest. Thus, the approach adopted by the Commission, taken as a whole, assures that the new entrant credit functions as intended, regardless of where the applicant obtains the funds with which it bids.

21. It is of no surprise that BFBFM advances an alternate approach, designed to assure that the applicant with the most money prevails. While BFBFM's preferred approach would benefit its private interests, it has not shown how such an approach would benefit the public interest. The results of the auction of the Biltmore Forest permit demonstrate that Liberty alone was able to outbid BFBFM. Had BFBFM's approach been adopted, here, eliminating Liberty from the competition, BFBFM would have prevailed. However, the public interest would not have been served because the permit would have been sold for almost one million dollars less than Liberty's winning bid. Apparently, this is what BFBFM means by "skewing" the auction. Yet, this is

precisely what Congress intended: that broadcast authorizations be auctioned for the highest price so that the public receives the benefit, not that private parties such as BFBFM receive a windfall by obtaining them below market value.

22. It is clear that Liberty played by the rules, as established by the Commission, and won. BFBFM's complaint is not with Liberty's conduct, but with the rules of the game. Unfortunately for BFBFM, its challenge comes to late.

WHEREFORE, premises considered, the Motion to Enlarge Issues, filed by BFBFM should be DISMISSED OR DENIED.

Respectfully Submitted

LIBERTY PRODUCTIONS,
A LIBERTY PARTNERSHIP

By: 

Timothy K. Brady
Its Attorney

P.O. Box 71309
Newnan, GA 30271-1309

November 26, 1999

DECLARATION

I, Valerie Klemmer Watts, hereby depose and state that:

1. I am the sole general partner of Liberty Productions, a Limited Partnership ("Liberty").

2. None of the members of my immediate family currently have or have had at any time since the filing of Liberty's application any interest, direct or indirect, in any medium of mass communications.

3. Prior to the submission by Liberty of its short form application (FCC Form 175), I determined the amount of the total equity investment made by its sole limited partner, David Murray, as well as the approximate amount of Liberty's total asset value, as defined as the total equity investments of both its general and limited partners plus its debt.

4. Based on these calculations I concluded that David Murray's equity investment, which did not exceed \$ 36,000, represented substantially less than 33% of Liberty's total asset value, as defined by its equity plus its debt, which exceeded \$120,000

David Murray is not a creditor of Liberty.

5. As of August 20, 1999, Liberty had no agreement or understanding, whatsoever, with Cumulus Broadcasting, Inc.

I hereby certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Signed and dated this 24th day of November, 1999.


Valerie Klemmer Watts

CERTIFICATE OF SERVICE

I, Timothy K. Brady, hereby certify that I have this *TKB*
day of November, 1999, served a copy of the foregoing Opposition
to Motion to Enlarge Issues by First Class mail, postage prepaid
upon the following:

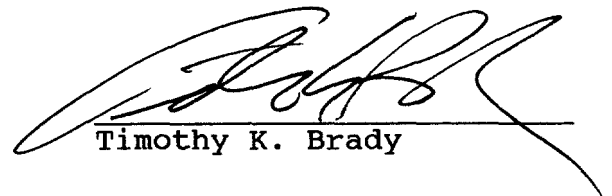
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